Federal Court  Cour fédérale

Date: 20150819

Docket: IMM-150-15

Citation: 2015 FC 988

Montréal, Quebec, August 19, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TAREQ RAHIMI
BENAFSHA RAHIMI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

> [1] "[…] the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Faryna v Chorny*, [1952] 2 D.L.R 354 (BCCA)).
>
> As specified in *Froment v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1002, 299 FTR 70). As quoted from *Kitomi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1293 [*Kitomi*].

II. Introduction

[1] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the Applicant challenges the decision of a visa officer of the High Commission of Canada in London, United Kingdom [High Commission], dated November 7, 2014, refusing his sponsorship application of his spouse.

III. Background

[2] The Applicant was born in Kabul, Afghanistan. The Applicant and his family fled the war in Afghanistan and initially sought refuge in Iran. The family resettled in Canada when the Applicant was 18 years old, after having been recognized as refugees by the United Nations.

[3] On March 30, 2009, the Applicant became a Canadian citizen.

[4] The Applicant has six sisters and two brothers who live in the Montréal area.

[5] The Applicant married for the first time on April 6, 2006. The couple later separated on November 1, 2010, and obtained a judgment of divorce in the Quebec Superior Court on March 27, 2013.

[6] The divorce took effect thirty-one days later, on April 27, 2013.

[7] On June 12, 2012, after having been introduced by a family member, the Applicant and his spouse spoke on the phone for the first time.

[8] The Applicant and his spouse got engaged over the phone on November 25, 2012.

[9] On March 18, 2013, the Applicant traveled to Pakistan to meet his spouse for the first time. The couple married two weeks later, on March 31, 2013. On April 14, 2013, the Applicant returned to Canada.

[10] On August 11, 2013, the Applicant applied to sponsor his new spouse as a member of the family class.

[11] On September 10, 2013, Citizenship and Immigration Canada advised the Applicant that he is ineligible to sponsor his spouse because he was the spouse of another person at the time of their marriage.

[12] On December 12, 2013, the Applicant submitted a request for humanitarian and compassionate [H&C] considerations pursuant to subsection 12(1) of the IRPA.

[13] The Applicant enquired about the status of his sponsorship application on two occasions, on May 26, 2014 and July 31, 2014. On both occasions, the High Commission replied that the application was in process or waiting to be reviewed, and that no further action was required on the Applicant's part.

[14] On November 7, 2014, the visa officer informed the Applicant's spouse that her application for a permanent resident visa was rejected on the basis of insufficient H&C grounds to overcome the Applicant's ineligibility.

[15] It is this decision which is being challenged before the Court.

IV. Impugned Decision

[16] In a letter dated November 7, 2014, the officer found that the Applicant's spouse cannot be considered as a member of the family class under paragraph 117(1)(*a*) of the *Immigration and Refugee Protection Regulations*, DORS/2002-227 [IRPR] by virtue of subparagraph 117(9)(*c*)(i) of the IRPA. This provision excludes a foreign national from the family class whose sponsor was, at the time of their marriage, the spouse of another person.

[17] The officer also considered section 4 of the IRPR, which provides that for the purpose of the IRPR, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership of conjugal partnership is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the IRPA.

[18] Finally, the officer concludes the following:

> Your sponsor was not free to marry at the time of your marriage. You have not provided us with any updated information demonstrating a continued relationship with your sponsor since your wedding. Your sponsor has indicated your intention to have children but you do not have any children at the moment. There are

> no immigration barriers to your sponsor's living in your country of residence. I am not satisfied that there are sufficient H&C grounds to overcome your sponsor's failed eligibility.
>
> (Officer's Decision dated November 7, 2014, Applicant's Record, at p 7)

V. Legislative Provisions

[19] Subsection 11(1) and 12(1) of the IRPA provide:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11**. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
Family reunification	**Regroupement familial**
12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12**. (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

[20] Subsection 117(9) of the IRPR enunciates the applicable family class exclusion:

117. (1) A foreign national is a	**117**. (1) Appartiennent à la

member of the family class if, with respect to a sponsor, the foreign national is	catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
(*a*) the sponsor's spouse, common-law partner or conjugal partner;	*a*) son époux, conjoint de fait ou partenaire conjugal;
…	[…]
Excluded relationships	**Restrictions**
117. (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	**117**. (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
…	[…]
(*c*) the foreign national is the sponsor's spouse and	*c*) l'époux du répondant, si, selon le cas :
(i) the sponsor or the foreign national was, at the time of their marriage, the spouse of another person, or	(i) le répondant ou cet époux étaient, au moment de leur mariage, l'époux d'un tiers,

VI. Issues

[21] The Applicant submits the following issues to be considered by the Court:

a) Did the High Commission err in law by failing to consider or mention the major points submitted by the Applicant for H&C considerations?

b) Was the High Commission's decision unreasonable in light of the reasons given?

c) Did the High Commission use the wrong test in refusing to exercise its H&C discretion under section 25 of the IRPA? In such discretion limited to cases of unusual and undeserved, or disproportionate hardship?

d) Did the High Commission violate the principles of natural justice by advising the Applicants that no further action by them was required and subsequently rejecting the application because the Applicant's spouse had not provided any updated information demonstrating a continued relationship with her sponsor since her wedding?

(Applicant's Memorandum, Applicant's Record, at para 32)

VII. Arguments

A. *Applicant's Position*

[22] First, the Applicant submits that contrary to the guidance provided in the applicable *Operational Manual IP 5*, section 5.10, the officer failed to consider the H&C factors put forward by the Applicant, including his relationship with his spouse, his establishment in Canada, the support he provides to his siblings in Canada, the lack of opportunities for the Applicant in Pakistan, and the dangers of living in Peshawar.

[23] The Applicant also submits that the officer's failure to mention the major factors that speak to hardship justifies the intervention of the Court and that the officer's decision was made without regard to the evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 1425 [*Cepeda-Gutierrez*]).

[24] Second, the Applicant argues that the officer's decision is unreasonable in its consideration of H&C factors. In particular, the officer's cursory evaluation failed to assess the relationship between the Applicant and his spouse, as well as the factors which are critical in

evaluating the genuineness of a marriage, such as credibility, compatibility, communications, the couple's knowledge of one another, and the development of the relationship.

[25] Furthermore, the Applicant contends that the officer failed to address evidence that is relevant to the question of cultural norms. The Applicant points out that the officer did find that the Applicant and his spouse "are similar ages, appear well-matched in terms of education/background" and that they "appear to have followed cultural norms when celebrating marriage, which appears to have been well-attended" (Officer's Notes, Certified Tribunal Record, at p 5). The evidence suggests that the marriage, while not formally arranged, did follow cultural norms with an introduction from a family member and the presence of family from both sides at the engagement party, the first meeting and the wedding celebration.

[26] The Applicant also argues that the officer's decision is unreasonable in that it fails to give weight to the Applicant's family integrity, which is fundamental value and human right recognized in international law.

[27] Third, relying on the Federal Court of Appeal's decision in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 [*Kanthasamy*], the Applicant contends that the unusual, undeserved, or disproportionate hardship test applied by the officer incorrectly narrows the scope of H&C discretion.

[28] Fourth, the Applicant submits that the officer failed to observe the principles of natural justice, on the one hand, by not giving the Applicant an opportunity to provide updated

information relating to his and his spouse's relationship and on the other, by relying on the lack of evidence pertaining to this factor in the reasons for decision.

[29] Finally, the Applicant submits that he and his spouse had a legitimate expectation that they could rely on the High Commission's communications advising them that "no further action is required at this time".

B. *Respondent's Position*

[30] The Respondent argues that the issues before the Court relating to the officer's exercise of discretionary power pertaining to H&C grounds and assessment of the genuineness of the relationship, which are questions of fact and of mixed facts and law, are to be reviewed on the deferential standard of reasonableness.

[31] First, the Respondent contends that the Applicant is ineligible to act as a sponsor and his spouse is excluded from the family class, in accordance with subparagraph 117(9)(*c*)(i) of the IRPR. The facts demonstrate that the Applicant was still married to his former spouse at the time he married his current spouse.

[32] Second, as evidenced by the refusal letter dated November 7, 2014, and the officer's Global Case Management System [GCMS] notes, the officer duly considered all the H&C considerations and provided coherent reasons in rejecting the application.

[33] The Respondent points to the evidence that the relationship between the Applicant and his spouse does not appear to be genuine and their marriage seems to have been entered primarily for the purpose of acquiring a status or privilege under the IRPA. As such, it was reasonable for the officer to conclude that the Applicant's relationship does not weigh in favor of granting the requested exemption.

[34] According to the Respondent, contrarily to the Applicant's assertions, the visa officer adequately outlined the Applicant's submissions in the GMCS notes, which form part of the reasons. The Respondent submits that the Applicant is inviting the Court to reweigh the evidence on file.

[35] Third, the Respondent argues that the H&C test of "unusual and undeserved or disproportionate hardship", enunciated by the Federal Court of Appeal's decision in *Kanthasamy*, above, remains applicable.

[36] Finally, the Respondent contends that there was no breach of procedural justice. The Respondent submits that the onus rests upon the Applicant to present sufficient evidence by providing all relevant information and evidence demonstrating sufficient H&C considerations. It is commonly accepted that procedural fairness does not require that a visa officer provide an Applicant with a running score of the weaknesses of their application (*Rukmangathan v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ 317).

VIII. Analysis

[37] It appears that the major factors or elements submitted by the Applicant-Sponsor were not considered. No mention is made of the fact that the sponsor and his siblings, all of whom he supports in Canada, were, as per the evidence, Afghan refugees, recognized by the United Nations and resettled in Canada due to their precarious situation; the officer, nevertheless, despite their plight, and although they were recognized in Pakistan by the United Nations for that which had taken place in Afghanistan (thus, requiring resettling as had been accepted by the United Nations, and then by Canada in the case of the sponsor and his siblings, who had been received *de facto*, and, *de jure* status in Canada), concludes without substantiation, that the sponsor could join his spouse in the Peshawar region of Pakistan (without mention of the precariousness of the region due to its inherent problems imported from Afghanistan).

[38] The decision under analysis does not appear to be reasonable in view of the detailed significant and intricate local, cultural, oriented subject-matter as to the sum of all parts of the intrinsic evidence of the narrative itself. The evidence, in essence, is not contradicted, at its very core, in respect of the situation of the sponsor, nor in regard to the point-specific proof of the family situation as a unit and key factors as to the relationship of the entire family with the sponsoree. Reference is made to paragraph 17 of *Cepeda-Gutierrez*, above.

[39] It is based on both cultural norms and the inherent logic that flows from the context from which the couple originates (*Kitomi*, above).

[40] It is most important to recall that the July 31, 2014 High Commission's reply clearly stated in writing "your application is in process, no further action is required at this time", furthermore, with thanks "for keeping your correspondence to a minimum".

[41] Also, it does not appear that the factors listed in the operation manual, in respect of establishment, support of relatives in Canada, as well as ties to Canada, were adequately considered. Nor was it recognized that the short-fall duration count in respect of the original declaration of divorce and subsequent coming into effect of the divorce of the principal Applicant was an inadvertent oversight by the principal Applicant due to the procedural technicality as specifically demonstrated in the pleadings of the Applicant as to the misunderstanding between the declaration of divorce and its coming into effect.

[42] The test in respect of subsection 25(1) of the IRPA must be revisited in this case. It appears that the test was made more stringent than it is.

[43] Answers given to the officer's questions, as they appear in the responses of the sponsored spouse questionnaire, have not been duly considered for significant key information. In addition, the officer had simply set aside his very own remarks in regard to that which he had already found and had noted as satisfactory.

[44] Also, the written statement of the High Commission as transmitted in two emails in respect of the application of the Applicants, that "no further action is required at this time" with thanks "for keeping your correspondence to a minimum" must be considered in light of the

judgment of the Federal Court of Appeal in *Bendahmane v Canada (Minister of Employment and Immigration)*, (C.A.), [1989] 3 F.C. 16. This judgment must be kept in mind due to the reiterated last few words of thanks also to the Applicants for "for keeping your correspondence to a minimum" as to the principle of "reasonable expectation". This phrase, in and of itself, refutes the officer's decision in question.

IX. Conclusion

[45] For all of the above reasons, the motion for judicial review is granted and the matter is to be considered by a different decision-maker anew.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion for judicial review be granted; and therefore, the entire matter is to be considered anew by a different decision-maker. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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